(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

FLONA HEIDEMAN, et al.,

Petitioners,

v.

SOUTH SALT LAKE CITY,
a Utah Municipal Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Plaintiff who seeks to rebut the assumptions relied upon by a municipality in passing a "Sexually Oriented Business" ordinance must rebut *every possible* assumption made by the City, in order to carry its burden under the U.S. Supreme Court decisions in *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425 (2002) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); or whether a substantial body of evidence rebutting those assumptions, is sufficient to overcome Summary Judgment.

LIST OF ALL PARTIES

Current:

Flona M. Heideman
Mariea M. Berryman
Crystal Dieringer
Amber Blanke
Heather Liljenquist
Jenifer Goff
Leah Malcolm
Ashleigh Mann
American Bush, Inc.

Former Plaintiffs, who have been dismissed for this action:

Jenuary Webb
Stacy Lamb
Bobbie Gleason
Amy Woods
Jeanne Bickerstaff
Felina Johnson
Nichole Beeny

CORPORATE DISCLOSURE STATEMENT

Plaintiff American Bush, Inc., is a Utah corporation, closely held, with no ties to any publicly held corporation.

TABLE OF CONTENTS

	Page
OPINION AND ORDERS	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF FACTS	2
PROCEEDINGS	4
REASONS FOR GRANTING WRIT	7
THE EVIDENCE INTRODUCED BY PLAINTIFFS IS SUFFICIENT TO OVERCOME SUMMARY JUDGMENT. PLAINTIFFS ARE ENTITLED TO A TRIAL ON WHETHER THE ORDINANCE IS JUSTIFIED AS A VALID RESPONSE TO "NEGATIVE SECONDARY EFFECTS"	7
CONCLUSION	18
APPENDIX	
1. Previous Decisions	App. 1

TABLE OF AUTHORITIES

Page

CASES

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 3, 7, 13, 14, 15

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 7, 13, 14, 15, 16

Daytona Grand, Inc. v. City of Daytona Beach, Fla., 410 F.Supp.2d 1173 (M.D.Fla. 2006) 13

Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003) 11

Flanigan's Enterprises, Inc. of Georgia v. Fulton County GA., 242 F.3d 976 (11th Cir. 2001) 13

Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003) 1, 7

Heideman v. South Salt Lake City, Case No. 04-4199 (10th Cir. Feb. 2, 2006) 8

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida, 337 F.3d 1251 (11th Cir. 2003) 11, 17, 18

Petersen v. South Salt Lake, 1999 UT 93, 987 P.2d 57 (Utah 1999) 16

Tollis v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987) 10

United States v. O'Brien, 391 U.S. 367 (1968) 8, 11

World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004) 13, 14

OTHER AUTHORITY

"The Need for Legislation to Enshrine Free Exercise in the Land Use Context," 32 U.C. Davis L. Rev. 725 (1999) 15

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Salt Lake City Code

5.56.310 Sexually oriented business employee conduct.

It is unlawful for any sexually oriented business licensee or sexually oriented business employee to knowingly or intentionally:

G. Appear in a state of nudity before a patron on the premises of a sexually oriented business.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Individual Plaintiffs were previously licensed as nude dancers in South Salt Lake or wish to become so. They believe their freedom of expression has been compromised as a result of being required to partially cover themselves during performances, and Plaintiffs Berryman, Dieringer, Liljenquist, Goff, Heideman, Malcolm and Mann filed affidavits asserting their belief that the restrictions on nudity interfered with their erotic message. Plaintiff

American Bush, Inc. is a Utah Corporation with its principal place of business in South Salt Lake City, Salt Lake County, State of Utah. This Plaintiff was previously licensed as a nude dancing establishment, and is now licensed for semi-nude dancing as defined by South Salt Lake ordinance. American Bush has operated under South Salt Lake SOB Ordinances since February, 1991.

In 1990, the City passed a "Sexually Oriented Business" (SOB) Ordinance, regulating adult entertainment businesses, including licensing of both businesses and its employees. The Ordinance was amended in 1993 and again in 1996.

In, 2001, the City Council passed ordinance # 2001-04, repealing the previous SOB Ordinance, and enacting a new Ordinance in its place. The Ordinance eliminates the category of license for a nude entertainment establishment, previously held by American Bush, Inc. It contains a Preamble referred to in the panel decision, concerning various forms of "secondary effects" associated with nude dancing and other adult oriented businesses. Unlike the ordinance upheld by this Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this is not a general anti-nudity ordinance, but an ordinance aimed specifically at the erotic message of the individual Plaintiffs.

Affidavits of Hal Cannon and Steve Cook, an attorney for other nude dancing establishments in South Salt Lake, state that there has been no pattern of arrests resulting from unlawful operations of any of the nude entertainment businesses, and that the businesses have been remarkably free of legal problems over a period of many years. Other affidavits by neighbors of the establishments contest any allegations of crime or decreased property values. Plaintiffs

also engaged the servic[illegible] Dr. Daniel Linz, as an expert on secondary effects. According to the expert report of Dr. Linz: "The strong implication of the findings of this study is that to ban nudity and requiring dancers to wear clothing at alcohol serving sexually oriented businesses will not reduce adverse secondary effects associated with these businesses."

PROCEEDINGS BELOW

Plaintiffs filed this action, seeking a Preliminary Injunction against the enforcement of the 2001 City Ordinance. The District Court denied that injunction in language which seemed to reflect the Court's determination that Plaintiffs' cause of action had no merit. Plaintiffs appealed the denial of the injunction to the Tenth Circuit Court, which affirmed the denial, but on the basis of an inadequate record. The Court determined that the factual record was inadequate to determine the case on the merits:

> In summary, as the case is now postured, the Plaintiffs put on no evidence before the district court to establish a likelihood that *O'Brien* factors two, three and four favored their case on the merits. Because they failed to put on such evidence, the Plaintiffs have not demonstrated a substantial likelihood of success on the merits. *Id.* at 1200.

CONCLUSION

For the foregoing reason, the decision of the district court denying the Plaintiffs' motion for preliminary injunction is AFFIRMED. However,

> because the record before us is very limited, we express no opinion on the ultimate merits of the case.

Upon remand to the Trial Court, and after discovery was completed, the Court granted Summary Judgment to Defendant commenting that "Plaintiffs' theory of the case appears to be that the Court should re-weigh the legislative evidence *de novo* and assess the wisdom of the City's legislative judgment." (D. Utah Op. P. 6). The Court of Appeals once again rejected the lower Court's rationale, but affirmed the decision:

> We agree with the district court that the City's evidence meets the "reasonably believed to be relevant" standard set forth by the Supreme Court in *City of Renton v Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). However, we disagree with the court's characterization of Plaintiffs' challenge, namely, that Plaintiffs' action simply asks the court to re-weigh the City's evidence *de novo* and assess the wisdom of the City's judgment. Rather, we view Plaintiffs' claims within the evidentiary burden-shifting framework set out by the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002) (plurality opinion), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-98 (2000) (plurality opinion). See also *Heideman I*, 348 F.3d at 1198 (stating that City's "initial burden to present empirical support for its conclusions [regarding necessity of ordinance] is minimal, but that plaintiffs must have an opportunity to present their own evidence, to which the city is then entitled to respond"). Under this approach, we examine whether Plaintiffs' evidence was sufficient to cast doubt on the City's evidence and its reliance thereon to support passage of the Ordinance. If

> so, Plaintiffs shift the burden of proof back to the City and foreclose summary judgment. Plaintiffs failed to clear this evidentiary hurdle. Slip Op. pp. 5-6.
>
> Although Plaintiffs submitted evidence and rebuttal of other negative secondary effects cited by the City in its Ordinance, such as diminished property values and crime, they presented no evidence whatsoever that nude conduct does not result in unsanitary conditions, unlawful sexual conduct, or the transmission of sexually transmitted diseases. Slip Op. 7.

This statement was footnoted:

> In their reply brief Plaintiffs claim that at least some of the evidence the City relied upon in finding that unsanitary conditions are connected with nude entertainment involves establishments different from those employing Plaintiffs and from Plaintiff American Bush, Inc. Reply Br. At 4-5. Specifically, Plaintiffs claim that evidence of unsanitary conditions and unlawful sexual activity associated with "peep shows" and video booths is not probative as to the existence of unsanitary conditions and unlawful sexual activity at nude dancing establishments. Plaintiffs, however, misunderstand the nature of their burden of proof. The City is permitted to rely on evidence of conditions at adult oriented business in general. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) ("Because the nude dancing [at plaintiff's establishment] is of the same character as the adult entertainment at issue in *Renton* [*v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), namely, adult motion pictures], *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) [same], and *California v. LaRue*, 409 U.S. 109

> (1972) [erotic dancing], it was reasonable for [the city] to conclude that such nude dancing was likely to produce the same secondary effects."). Plaintiffs' only means of rebutting this evidence, therefore, is to submit evidence showing how and why their particular activities and/or establishments do not present similar concerns. Plaintiffs simply did not do this. *Id.* Fn. 1.

REASONS FOR GRANTING THE WRIT

THE EVIDENCE INTRODUCED BY PLAINTIFFS IS SUFFICIENT TO OVERCOME SUMMARY JUDGMENT. PLAINTIFFS ARE ENTITLED TO A TRIAL ON WHETHER THE ORDINANCE IS JUSTIFIED AS A VALID RESPONSE TO "NEGATIVE SECONDARY EFFECTS".

In affirming the denial of Plaintiffs' Preliminary Injunction request, the Tenth Circuit, in *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) (*Heideman I*), reaffirmed the right of Plaintiffs to contest the actual basis for the ordinance. This Court, referring to *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) stated:

> This suggests that the City's initial burden to present empirical support for its conclusion is minimal, but that plaintiffs must have an opportunity to present their own evidence, to which the city is then entitled to respond. *Id.* at 1198.

The Court also cited *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-439 (2002) (plurality opinion):

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's

> evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. *Id.* at 1199.

The Circuit Court reviewed the Ordinance under the "intermediate scrutiny" test of *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968):

> Under intermediate scrutiny, a restriction on speech must: (1) be within the constitutional power of government to adopt; (2) further an important or substantial government interest; which (3) is unrelated to the suppression of expression; and (4) be no greater restriction on First Amendment freedom than is essential to furtherance of the government's purpose. 348 F.3d at 1197.

The Court, in *Heideman v. South Salt Lake City,* Case No. 04-4199 (10th Cir. Feb. 2, 2006) (*Heideman II*), noted that Plaintiffs had submitted substantial rebuttal evidence tending to put the second and third prongs of the *O'Brien* test at issue, but held, as a matter of law, that the evidence was insufficient to overcome summary judgment. Plaintiffs obtained an expert witness to attack the validity of studies and reports; they filed Affidavits from neighboring property owners stating that their properties and businesses have not been adversely affected by their

proximity to Plaintiff American Bush; they supplied the Affidavit of the owner of American Bush, Inc. that he has fully complied with existing regulations, and that banning nude dancing would force him to serve alcohol while providing semi-nude dancing, thus *increasing* the potential for negative secondary effects. The Tenth Circuit, however, cited "the City's clear interest in the diminishment of such secondary negative effects as unsanitary conditions, unlawful sexual activity, and the transmission of sexually transmitted diseases." (Slip Op. p. 7); and accepted the City's argument that it need not show such a correlation, and may rely on studies of other cities and their problems, even if the businesses are substantially dissimilar. In the footnote set out in full above, the Court set an impossible standard. The Court said that the City might, for instance, use evidence of unsanitary conditions or unlawful sexual activity at "peep shows" and video booths, not existing in South Salt Lake to eliminate nudity. Nude dancing establishments in South Salt Lake have always been heavily regulated; and the evidence is that Plaintiffs have always followed those regulations. Defendant conceded that it had no evidence of unlawful conduct, sanitation problems or the transmission of disease in its Interrogatory Answers (Aplt. App. 501-513).

Plaintiffs did, in fact, submit evidence on all the points referred to by the Court; and the Court's dismissal of that evidence is self contradictory. If in fact Plaintiffs "submitted evidence in rebuttal of other negative secondary effects . . . , such as . . . crime", by definition, they have also presented evidence "that nude conduct does not result in . . . unlawful sexual conduct." (Slip. Op. p. 7). By pointing out the substantial difference between Plaintiffs' businesses and "peep shows" and video booths, and the

concessions by the City, Plaintiffs have clearly shown that there is a dispute over whether that conduct results in unsanitary conditions. By showing the history of regulations of nude dancing establishments, including distance requirements between dancers and patrons, and the lack of citations for violation of those regulations, Plaintiffs have produced evidence which contradicts reports of unsanitary conditions or the possibility of the transmission of sexually transmitted diseases. In fact, all previous versions of the South Salt Lake SOB ordinance included requirements that individual dancers provide proof that they are "free of any contagious or communicable diseases", as part of the application process. That requirement is not included in the ordinance at issue here, because experience has simply proved it unnecessary.

Plaintiffs believe that there is indeed a split in the Circuits as to the kink, quantity, and quality of rebuttal information which is necessary in order to avoid summary judgment for the Defendant municipality.

In *Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) the Court outlined the test as to whether the purpose of an ordinance is related to the suppression of expression:

> The County must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects. 827 F.2d at 1333.

Plaintiffs have validly questioned whether the current law is a reasonable reaction to the situation which exists, or is reasonably expected to exist, in South Salt Lake. In order

to satisfy *O'Brien*, the restriction must be no greater than is essential *and* it must actually be linked to the achievement of the permitted goal. The efforts of the City over several years effectively dealt with any problems generated by such businesses; and banning nudity cannot be linked to a specific concern. The Fifth Circuit Court of Appeals, in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003) analyzed an adult zoning ordinance. The Court found the ordinance did not meet the requirement of narrow tailoring. The Court said:

> A time, place, and manner regulation meets the narrow tailoring standard if it "targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby*, 487 U.S. at 485. Although the government need not choose the "least intrusive means" to advance its legitimate interests, it "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. 330 F.3d at 293-4.

In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003), the Court discussed at length the historical jurisprudence on the subject of nude dancing and attempts to regulate it:

> In response to the County's motion for summary judgment, the Adult Lounges placed into the record a two-volume "Appendix in Support of Peek-A-Boo Lounge and Temptations II's Opposition to Proposed Manatee County Public Nudity Ordinance [No. 99-18]," which it had previously submitted to the Manatee County Planning Commission during the public hearings the Commission held prior to the adoption of Ordinance 99-18. These materials include satisfactory

health and safety inspection reports of plaintiffs' businesses issued by the Florida Department of Health and the Cedar Hammock Fire Department; incident reports of criminal activity near the Adult Lounges and elsewhere showing lower crime rates near Appellants' businesses than in surrounding areas; recent sales and assessment data revealing an increase in property values for property located near Appellants' businesses; and an award given in 1996 to the Peek-A-Boo Lounge by Manatee County Sheriff for its "outstanding contribution to the community".(References to Exhibit numbers omitted).

In further response to the summary judgment motion, the Adult Lounges also submitted three expert studies specifically addressing local conditions in Manatee County which purported to show that there was no evidence connecting their businesses with negative secondary effects. Dr. Terry A. Danner, Chair of the Department of Criminology at St. Leo University, conducted a study utilizing the County's own crime statistics that examined the criminogenic effects of the Appellant's specific businesses and found that Appellants businesses did not cause such effects. *Id.* at 1270.

Rather, as the record now stands, we have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects. Under these circumstances, we cannot credit the County with complying with Renton's narrow tailoring requirement,

> which requires that a secondary effects ordinance be drawn to affect only that category of business "*shown to produce* the unwanted secondary effects." Emphasis in original. *Id.* at 1272.

Flanigan's Enterprises v. Fulton County, 242 F.3d 976 (11th Cir. 2001) held that where contrary information, showing a lack of secondary effects, is available on a local basis, it cannot be ignored. In that case, Fulton County (Atlanta) commissioned a study which was expected to show that crime increased around nude dancing establishments. The study found the opposite; and the City attempted to ban nude dancing anyway. Perhaps the Court there could have found *some* isolated fact that seemed to support that regulation. Instead, the Court found that the great weight of the evidence was opposed to the claims the City made, and summary judgment was denied to the County. See also *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 410 F.Supp.2d 1173 (M.D.Fla. 2006). The Court there granted Plaintiff a trial at which Plaintiff produced evidence casting doubt on the City's rationale for its ordinance which prohibited nude dancing where alcoholic beverages were served. After a six-day trial, the Court found that the City's evidence did not overcome the negative evidence introduced by Plaintiff. Here, though the evidence submitted by Plaintiff was similar, the Court granted summary judgment to the City. If *City of Erie* and *Alameda Books* are to have any validity, summary judgment should not be granted where the Plaintiff does its homework and puts the mainstay of the City's assumptions into doubt.

Other Circuits have, however, held that the municipality can rely on "very little evidence" to uphold their regulations. In *World Wide Video of Washington, Inc. v.*

City of Spokane, 368 F.3d 1186 (9th Cir. 2004) the Court held that it was sufficient for the City to show a problem with "pornographic litter and public lewdness". The Court said that "the sexual images on the packages may be protected, but if the stores' product is consistently discarded on public ground, municipal regulation may be – and, in this case, is justified." *Id.* at 1196. It would seem, under this reasoning, that a Plaintiff would indeed have to extend his imagination enough to cover *every possible* concern over his business or his product, to even get into court. As the Fifth and Eleventh Circuits have held, this view eviscerates the rulings in *City of Erie* and *Alameda Books*. Surely this Court did not mean to pay lip service to an impossible dream. Surely this Court did not mean to tantalize a Plaintiff with a totally impossible standard; but it appears that the Tenth Circuit, along with some others, have read such an impossible standard into these rulings.

Rather than engage in such speculation that there may be *some* assertions to which Plaintiffs did not fully reply, Plaintiffs believe that the Tenth Circuit, in the instant case, should have found that there are now sufficient facts in dispute to deny summary judgment to Defendant. The Court noted that the District Court did not do its job in reviewing the available evidence under the test of *Alameda Books*. A fair and realistic reading of the standards set in *Alameda Books* will require more cities to defend their actions before a trier of fact. That really is the only effective way to decide if the City relied on "shoddy data". As the Court has previously said that it is not a court's job to second-guess the City Council on the wisdom of its actions; neither is it the job of the court to stretch and strain to assist the City Council in coming up with *some* rationalization, no matter how slight, to justify its

decision. Putting the City to its proof on occasion will eliminate the "shoddy data" on which many cities do rely, and will instill some validity to the process.

Among material submitted to the District Court, was an article entitled "The Need for Legislation to Enshrine Free Exercise in the Land Use Context", *32 U.C. Davis L. Rev. 725 (1999)*. This article was written by two attorneys for the Utah law firm of Kirton and McConkie, who regularly do work for the Church of Jesus Christ of Latter-Day Saints. In it they express serious concern over activities of local governmental bodies which, on the surface appear to be "content neutral", but in practice have a "devastating effect on religious liberty", by discriminating against "unpopular" religions in building and zoning matters. Their lament: "Aware of the legal ramifications, government officials rarely announce that their opposition to a project is rooted in religious animus." *Id.* at p. 727. In other words, showing the bias which is obvious but is denied, is not always easy. This Court has at least given a Plaintiff an opportunity to rebut the evidence upon which a City *claims* to rely in its effort to restrict adult entertainment; and some circuits seem to have taken it away. Plaintiff asks that this Court take this opportunity to clarify that the standards set in *City of Erie* and *Alameda Books* can be realistically applied to those who put forth the effort to rebut the "shoddy data".

The studies relied on by the City refer to adult entertainment as a single category. No single report suggests, even in passing, that full nudity in dancing is associated with more problems than semi-nude dancing; or that the addition of pasties and g-strings might be expected to alleviate whatever problems are present. The reports uniformly were prepared in efforts to justify restrictive

zoning regulations directed at isolating SOB's from parks, schools, churches and homes. American Bush is located in an area away from any such uses. See *Petersen v. South Salt Lake*, 1999 UT 93, 987 P.2d 57 (Utah 1999). In *Heideman I*, the Court, in referring to the preamble and the studies, observed:

> Much of the City's professed concern about negative secondary effects arises from sexually oriented businesses in general rather than commercial nude entertainment in particular. The City offers no specific evidence that the requirement of pasties and G-strings will produce a significant incremental improvement in respect to the negative secondary effects. Moreover, the City has tolerated nude dancing establishments for many years, and even after embarking on a different policy took over a year to put the restrictions into effect. This invites skepticism regarding the imperative for immediate implementation. 348 F.3d at 1191.

Justice Kennedy, concurring in the result in *Alameda Books*, said:

> As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. 535 U.S. at 449-450.

Thus, it is well established that there must be a reasonable relation between perceived evils and the

remedy applied by the City. Defendant has made no case for the contention that the prohibition of nudity is likely to reduce or prevent secondary effects, especially in light of the fact that the one remaining establishment which formerly featured nude dancing has preliminarily qualified for an alcoholic beverage license. Certainly there is evidence that the consumption of alcoholic beverages on premises, is more of a problem for the City than simple nudity. Plaintiffs have challenged the City to extrapolate *any* evidence from the studies they have cited which suggest that minimally covering up dancers, and then allowing the sale of alcoholic beverages, would alleviate secondary effects. The City's argument is that once these businesses are lumped together into a classification of those who cause trouble, *any* regulation is justified. That conflicts with numerous court decisions.

The Supreme Court requires that the narrow tailoring be aimed at controlling secondary effects, rather than at the speech itself. The burden should now shift back to Defendant. Plaintiffs do not contend that the City cannot prove what they claim; they only claim that they should have to do so. If the evidence is as strong as the City claims it is, what have they to fear? Plaintiffs believe that this case is in *exactly* the same position as that in *Peek-A-Boo Lounge*:

> Rather, as the record now stands, we have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years,

do not cause secondary effects. 337 F.3d 1251, 1272.

CONCLUSION

Because the record does not support Summary Judgment, Plaintiffs are entitled to put on their evidence at trial and to contest the "reasonable reliance" of the City Council on evidence presented to it, in an effort to justify the anti-nudity regulation which is directly targeted at Plaintiff's free speech rights.

DATED May, 2006.

W. ANDREW MCCULLOUGH, L.L.C.
Attorney for Appellants

165 Fed.Appx. 627

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FLONA M. HEIDEMAN, MARIEA M. BERRYMAN; CRYSTAL DIERINGER; HEATHER R. LILJENQUIST; and JENNIFER GOFF,

Plaintiffs-Appellants,

ASHLEIGH MANN; LEAH RAE MALCOLM; and AMERICAN BUSH,

Plaintiffs-Intervenors-Appellants,

v.

SOUTH SALT LAKE CITY, a Utah Municipal Corporation,

Defendant-Appellee.

No. 04-4199
(D.C. No. 2:01-CV-918-BSJ)
(Utah)

(Filed Feb. 2, 2006)

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **MURPHY, O'BRIEN**, and **SEYMOUR**, Circuit Judges.

Plaintiffs, former nude dancers and an adult entertainment establishment that employs some of them, American Bush, Inc., filed this § 1983 action challenging on First Amendment grounds the enactment by South Salt Lake City ("the City") of an ordinance banning nudity in adult businesses. The district court granted the City's motion for summary judgment. Plaintiffs appeal, and we affirm.

The factual background of this action was set forth in a detailed and comprehensive opinion by this court addressing Plaintiffs' appeal of the district court's denial of their motion for preliminary injunction. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1184-87 (10th Cir. 2003) (*Heideman I*). Only facts relevant to the present appeal are included here.

The City permitted nude entertainment at certain licensed establishments until May 2, 2001, when it enacted an ordinance which, among other things, prohibits all nude conduct in adult business establishments, either by employees or patrons. S. SALT LAKE CITY, UTAH, ch. 5.56 (2001) (the "Ordinance"). This ban on nude conduct applies to all adult oriented businesses, not only businesses like Plaintiff American Bush, Inc., which provide live entertainment. The Ordinance does not prohibit erotic dancing, but instead requires employees engaged in erotic dancing to wear "G-strings" and "pasties."

In assessing the necessity of the nudity ban and other restrictions set forth in the Ordinance, the City council reviewed numerous court opinions and fifty-six reports

and studies from other municipalities regarding the negative secondary effects associated with adult oriented businesses. Aplt. App., vol. I at 76-77, 175-81. Upon review of these materials, the City Council made the following factual findings, which are set forth in the preamble and "purpose and findings" section of the Ordinance:

> (1) Sexually oriented businesses lend themselves to ancillary unlawful and unhealthy activities that are presently uncontrolled by the operators of the establishments. . . . (2) Certain employees of sexually oriented businesses defined in this ordinance as adult theaters and cabarets engage in higher incidents of certain types of illicit sexual behavior than employees of other establishments. (3) Sexual acts, including masturbation, and oral and anal sex, occur at sexually oriented businesses. . . . (5) Persons frequent certain . . . sexually oriented businesses for the purpose of engaging in sex within the premises of such sexually oriented businesses. (6) Numerous communicable diseases may be spread by activities occurring in sexually oriented businesses. . . . (7) According to research from the Kaiser Family Foundation, an estimated 650,000 to 900,000 Americans are infected with HIV. The number of new HIV infections occurring each year is now about 41,000. Men and [w]omen of all races are most likely to be infected by sexual contact. (8) A total of 1,672 AIDS cases had been reported in Utah as of January 1, 1999. . . . (9) The Center for Disease Control and Prevention estimate that as many as 1 in 3 people with HIV do not know they are infected. (10) The number of cases of early . . . syphilis in the United States reported annually has risen with 33,613 cases reported in 1982 and 45,200 through November of 1990. (11) The number of cases of gonorrhea in

> the United States reported annually remains at a high level, with over one-half million cases being reported in 1990. (12) The Surgeon General of the United States in his report of October 22, 1986, has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, . . . and from an infected mother to the newborn. (13) According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts. (14) Sanitary conditions in some sexually oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities and the failure of the owners and the operators of the facilities to self-regulate those activities and maintain those facilities. (15) Numerous studies and reports have determined that semen is found in the areas of sexually oriented businesses where persons view 'adult' oriented films. (16) The [preceding] findings . . . raise substantial governmental concerns.

Id. at 77-79.

Based on these factual findings, the Ordinance's preamble states that it is necessary "to protect and preserve the health, safety, morals and welfare of the patrons of [adult entertainment establishments] as well as the citizens of the City" *id.* at 75, because nude conduct increases the prevalence of, among other things, unsanitary conditions, unlawful sexual activities and sexually transmitted diseases. The Ordinance further states that "[t]he general welfare, health, morals and safety of the citizens of the City will be promoted by the enactment of

this Ordinance," *id.* at 80, which includes a total ban on nudity in adult entertainment establishments.

After the Ordinance was enacted, Plaintiffs filed the present action claiming that the nudity ban is an illegal infringement of their First Amendment rights. They sought a preliminary injunction, which the district court denied. We upheld the district court's ruling. *Heideman I*, 348 F.3d at 1200. After the parties conducted discovery, the City filed a motion for summary judgment, asserting among other things that Plaintiffs failed to submit sufficient evidence to cast doubt on the evidence relied on by the City in enacting its Ordinance, or on the reasonableness of the City's reliance on that evidence. The district court granted the City's motion.

We review the district court's grant of summary judgment *de novo*, applying the same legal standard it used. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005).

In so doing, we affirm the district court's summary judgment, but on different grounds. *See United States v. Knox*, 124 F.3d 1360, 1362 (10th Cir. 1997) (citing *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465, 472-73 (10th Cir. 1975)) (appellate court will affirm rulings of lower court on any ground that finds support in record). We agree with the

district court that the City's evidence meets the "reasonably believed to be relevant" standard set forth by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). However, we disagree with the court's characterization of Plaintiffs' challenge, namely, that Plaintiffs' action simply asks the court to re-weigh the City's evidence *de novo* and assess the wisdom of the City's judgment. Rather, we view Plaintiffs' claims within the evidentiary burden-shifting framework set out by the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002) (plurality opinion), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-98 (2000) (plurality opinion). *See also Heideman I*, 348 F.3d at 1198 (stating that City's "initial burden to present empirical support for its conclusions [regarding necessity of ordinance] is minimal, but that plaintiffs must have an opportunity to present their own evidence, to which the city is then entitled to respond"). Under this approach, we examine whether Plaintiffs' evidence was sufficient to cast doubt on the City's evidence and its reliance thereon to support passage of the Ordinance. If so, Plaintiffs shift the burden of proof back to the City and foreclose summary judgment. Plaintiffs failed to clear this evidentiary hurdle.

On appeal, Plaintiffs claim they did present sufficient evidence to call into question the reasonableness of the City's Ordinance and the reliability of the evidence supporting its enactment. Specifically, Plaintiffs point to testimony from their expert witness attacking the validity of studies and reports from other cities relied upon by the City, as well as affidavits from neighboring property owners stating that their properties and businesses have not been adversely affected by their proximity to Plaintiff American Bush, Inc.'s establishment. Aplt. App., vol. I at

172-74, 186-87, 189-90. Plaintiffs also point to affidavits and testimony from the owner of American Bush, Inc., stating that his establishment, for the most part, has complied fully with existing regulations, and that banning nude dancing would force it to start serving alcohol in order to compete with other adult entertainment businesses providing semi-nude dancing, thereby increasing, not limiting, the potential for negative secondary effects. *Id.* at 138-39, 192-98. We conclude, however, that this evidence fails to raise a genuine issue of material fact as to the reasonableness of the City's clear interest in the diminishment of such secondary negative effects as unsanitary conditions, unlawful sexual activity, and the transmission of sexually transmitted diseases.

Simply put, the record does not contain any evidence to counter the City's concern over unsanitary conditions or the possibility of public health concerns associated with unregulated nude conduct in adult business establishments. Although Plaintiffs submitted evidence in rebuttal of other negative secondary effects cited by the City in its Ordinance, such as diminished property values and crime, they presented no evidence whatsoever that nude conduct does not result in unsanitary conditions, unlawful sexual conduct, or the transmission of sexually transmitted diseases.[1] To the contrary, at least one piece of evidence

[1] In their reply brief, Plaintiffs claim that at least some of the evidence the City relied upon in finding that unsanitary conditions are connected with nude entertainment involves establishments different from those employing Plaintiffs and from Plaintiff American Bush, Inc. Reply. Br. at 4-5. Specifically, Plaintiffs claim that evidence of unsanitary conditions and unlawful sexual activity associated with "peep shows" and video booths is not probative as to the existence of unsanitary conditions and unlawful sexual activity at nude dancing establishments. Plaintiffs, however, misunderstand the nature of their

(Continued on following page)

submitted by Plaintiffs could be read to support the reasonableness of the City's concerns. In an affidavit Hallard Cannon, president and chief executive officer of American Bush, Inc., stated that in December 1999, two dancer-employees at his establishment "were cited for violations of the ordinance prohibiting 'touching while performing.'" *Id.* at 196. Regardless of the final outcome of those citations, Mr. Cannon's statement at the very least suggests that nude employees were either simulating masturbation or engaging in physical contact with patrons. Both of these activities reasonably could relate to the City's concern over unsanitary conditions and unlawful sexual activity and their relationship to sexually transmitted diseases. Regardless of the ultimate probative value of this evidence, the reality remains that Plaintiffs did not submit any evidence showing that nude conduct does not present the kinds of negative secondary effects the City seeks to curtail or eliminate by requiring employees and patrons to wear some measure of clothing. Accordingly, Plaintiffs failed to shift the burden of proof from themselves back to the City.

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burden of proof. The City is permitted to rely on evidence of conditions at adult oriented businesses in general. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) ("Because the nude dancing [at plaintiff's establishment] is of the same character as the adult entertainment at issue in *Renton [v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), namely, adult motion pictures], *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) [same], and *California v. LaRue*, 409 U.S. 109 (1972) [erotic dancing], it was reasonable for [the city] to conclude that such nude dancing was likely to produce the same secondary effects."). Plaintiffs' only means of rebutting this evidence, therefore, is to submit evidence showing how and why their particular activities and/or establishments do not present similar concerns. Plaintiffs simply did not do this.

Their failure to present sufficient evidence countering that proffered by the City compels us to further conclude that Plaintiffs did not raise any genuine issues of material fact to preclude the district court's grant of summary judgment against it. In *Heideman I*, we stated that the City's Ordinance, as a "time, place and manner" regulation designed to ameliorate negative secondary effects rather than to suppress speech, is to be reviewed under intermediate scrutiny pursuant to the four part test laid out by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under that test, the City's Ordinance will survive intermediate scrutiny if it "(1) [is] within the constitutional power of the government to adopt; (2) further[s] an important or substantial government interest; which (3) is unrelated to the suppression of expression; and (4) [is] no greater restriction of First Amendment freedom than is essential to furtherance of the government's purpose." *Heideman I*, 348 F.3d at 1197 (citations omitted). Plaintiffs' evidence is insufficient to raise genuine issues of material fact under the *O'Brien* test.

As we stated in *Heideman I*, "[t]here is no doubt that the Ordinance is within the lawful powers" of the City to enact. *Id. See also Pap's A.M.*, 529 U.S. at 296 (a city's "efforts to protect public health and safety are clearly within the city's [zoning] powers"). Therefore, the first prong of the *O'Brien* test is easily disposed of. As to the third prong, the Supreme "Court has consistently held that the control of negative secondary effects, such as those invoked by [the City], is unrelated to the suppression of the expression." *Heideman I*, 348 F.3d at 1200.

Hence, Plaintiffs cannot gain ground on the third prong.[2] Finally, as to the fourth prong, the district court observed, and we agree, that the requirement that dancers wear "G-strings" and "pasties" has a *de minimis* effect on their ability to communicate their message of eroticism. Aplt. App., vol. III at 863 (citing *Heideman I*, 348 F.3d at 1200). Therefore, the City's nudity ban and its accompanying requirement that dancers wear "G-strings" and "pasties" presents a restriction no greater than is necessary to further the City's stated interest in decreasing the likelihood of unsanitary conditions, unlawful sexual activity and sexually transmitted diseases.

Turning at last to the second prong of the *O'Brien* test, namely, whether the City's nudity ban is necessary to the

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[2] Plaintiffs assert, to the contrary, that the purpose of the Ordinance is the suppression of disfavored speech and that the amelioration of negative secondary effects is merely pretext for the City's impermissible aim. In support of their argument, Plaintiffs point to the deposition testimony of one council member and the City's Assistant Police Chief. Aplt. App., vol. III at 682-710. The City claims that transcripts of these depositions were not submitted to the district court. Indeed, the confusing nature of Plaintiffs' appendix makes it difficult to discern what evidence was, in fact, before the district court. We need not try to ascertain whether Plaintiffs' evidence, in fact, was submitted to the district court because even if it was, it is insufficient to raise a genuine issue of material fact as to whether the City's stated concern over negative secondary effects is pretext for the aim of suppressing protected speech. Regarding the council member's testimony, the Supreme Court has stated on several occasions that evidence of the impermissible motives of one legislator is insufficient to overcome the presumption that a legislative body's primary aim in enacting a given piece of legislation was not the suppression of disfavored speech. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). As to the testimony of the Assistant Police Chief, he was not involved in the decision to enact the Ordinance, and therefore any motive he may have had, impermissible or otherwise, is irrelevant to whether the Ordinance was enacted with the primary goal of suppressing speech.

furtherance of eliminating negative secondary effects, we reiterate that the City bears the initial burden of proving the reasonableness of its concerns over negative secondary effects as well as the reasonableness of its belief that the challenged regulation will successfully address those secondary effects. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). As we noted in *Heideman I* and as the Supreme Court has held time and again, however, this burden is not an onerous one. *Heideman I*, 348 F.3d at 1197-99. The City may rely on "seemingly pre-packaged studies, as well as the findings of courts in other cases." *Id.* at 1197; *see also Pap's A.M.*, 529 U.S. at 296 ("in terms of demonstrating that . . . secondary effects pose a threat, [a] city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses'") (quoting *Renton*, 475 U.S. at 51-52)). We agree with the district court that the City met its initial burden of presenting evidence "reasonably believed to be relevant." It was the Plaintiffs' burden then to submit evidence casting doubt on the reasonableness or relevance of the City's evidence and the inferences it drew from that evidence. As we have already stated, Plaintiffs failed to do this.

In sum, we conclude that Plaintiffs have not shown a genuine issue of material fact as to any of the four *O'Brien* prongs, and therefore the district court did not err in granting the City's motion for summary judgment. Accordingly, we **AFFIRM.**

ENTERED FOR THE COURT

Stephanie K. Seymour
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

FLONA HEIDEMAN, MARIEA M. BERRYMAN, JANUARY L. WEBB, CRYSTAL DIERINGER, HEATHER R. LILJENQUIST, and JENNIFER GOFF, Plaintiffs, vs. SOUTH SALT LAKE CITY, a Utah municipal corporation., Defendant.	Civil No: 2:01-CV-918 J **ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

* * * * * * * * *

(Filed Aug. 24, 2004)

PROCEDURAL BACKGROUND

Flona M. Heideman, Mariea M. Berryman, January L. Webb, Crystal Dieringer, Heather R. Liljenquist, and Jennifer Goff (collectively "Plaintiffs") are licensed as semi-nude dancers employed at the sexually oriented establishment "American Bush." They challenge the constitutionality of South Salt Lake City's Ordinance 2001-04 regulating nude conduct on the premises of sexually oriented business. At the outset of this case, Plaintiffs moved for preliminary injunction against the enforcement of Ordinance 2001-04. (*See* Complaint, filed November 19, 2001 (dkt. no. 1), at 3 ¶5.) On January 3, 2002, the Court ruled from the bench and denied Plaintiffs' motion (*see* Minute Entry, dated January 3, 2002 (dkt. no. 27)), after which the Court filed an Order reflective of this

ruling. (Order, dated January 29, 2002 (dkt. no. 30).) Plaintiffs appealed this ruling. (*See* Notice of Interlocutory Appeal, February 13, 2002 (dkt. no. 38).)

In a detailed opinion, the United States Court of Appeals for the Tenth Circuit affirmed. *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003). The Court of Appeals then remanded the case to the District Court and the parties engaged in discovery to amplify the record. At the close of discovery, the City moved for summary judgment. (Def.'s Motion and Memorandum for Summary Judgment, filed April 30, 2004 (dkt. nos. 116, 117).) Plaintiff opposed this motion on May 29, 2004 ("Pl.'s Opposition") (dkt. no. 134), to which Defendant filed its reply (Def.'s Reply") on June 21, 2004 (dkt. no. 138). The Court heard the matter on June 28, 2004. (*See* Minute Entry, dated June 28, 2004 (dkt. no. 141).) The matter has now been fully briefed, argued, and submitted.

FACTUAL BACKGROUND

Between 2000 and 2001, the South Salt Lake City Council researched and compiled cases, studies, and other documentary evidence from around the country concerning the negative secondary effects of sexually oriented businesses. The alleged secondary effects included, among other things, unsanitary conditions, increased risk of spreading venereal diseases, prostitution, crime, and property devaluation.

The City Council introduced Ordinance 2001-04 during a public meeting on February 21, 2001. (*See* Public Meeting Minutes, dated February 21, 2001, attached to Exhibit B to Rynearson Affidavit, filed April 30, 2004 (dkt. no. 122) as tab 2, at 2.) Plaintiffs' counsel, Andrew McCullough, and other

interested citizens made statements opposing the Ordinance. (*See id.* at 6-32.) Similarly, numerous citizens, including a former nude dancer and her mother, made statements supporting the ordinance. (*See id.*) The City Attorney, Craig Hall, and the City's outside counsel, Scott Bergthold, also spoke, summarizing the law and the negative secondary effects. (*See id.* at 6-8, 24-26, respectively.)

More than four weeks later, on April 25, 2001, the City Council voted to adopt Ordinance 2001-04. The Ordinance was signed by the Mayor on May 2, 2001, and is codified as Chapter 5.56 of the City's Code. The Ordinance states:

> It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote the health, safety, morals, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the City. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, . . .

(*See* Ordinance Preamble, attached to Exhibit B to Rynearson Affidavit, filed April 30, 2004 (dkt. no. 122) as tab 1, at 2.)

In sexually oriented businesses, a wide range of semi-nude erotic conduct is allowed, but an employee is required to wear nothing less than a "G-string" that covers the genitalia, anus, and anal cleft, and "pasties" that cover

the female nipples. (Code § 5.56.050 (definition of "nudity"), attached to Exhibit B to Rynearson Affidavit, filed April 30, 2004 (dkt. no. 122) as tab 1, at 10.) The Ordinance's prohibition on nudity applies to both employees and patrons in all sexually oriented businesses – including "adult cabarets." (Code §§ 5.56.310(G); 5.56.320(C), attached to Exhibit B to Rynearson Affidavit, filed April 30, 2004 (dkt. no. 122) as tab 1, at 24-25.) Plaintiffs assert that this restriction violates the First Amendment of the U.S. Constitution.

LEGAL STANDARD

1. Summary Judgment

The purpose of summary judgment is to assess whether trial is necessary. *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Viktus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991)). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that there are genuine issues for trial. *Viktus* at 1539 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991)). A "material fact" is one that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To constitute a genuine factual dispute, "there must be more than a scintilla of evidence" that is significantly probative in establishing the fact. *Viktus*, 11 F.3d at 1539. "To avoid summary judgment, the evidence must be

such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (*citing Anderson*, 477 U.S. at 248).

In applying the summary judgment standard, the court construes the factual record and reasonable inferences in the light most favorable to the party opposing summary judgment. *Blue Circle Cement, Inc. v. Bd. of County Comm'rs*, 27 F. 3d 1499, 1503 (10th Cir. 1994); *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F. 2d 1105, 1110 (10th Cir. 1991).

2. Intermediate Scrutiny of the *O'Brien* Factors

Because the governmental purpose for Ordinance 2001-04 is based on the secondary effects of nudity in sexually oriented businesses rather than on disagreements with the content of the message, the Ordinance is subject to no more than intermediate scrutiny. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1195 (10th Cir. 2002). The four "*O'Brien* factors" that a court must consider to determine whether the Ordinance 2001-04 is constitutional are whether: (1) the regulation is within the constitutional power of the government to enact, (2) it is designed to further a substantial governmental interest, (3) the interest is unrelated to the suppression of free expression, and (4) the regulation is not substantially greater than necessary to further the governmental interest. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-302 (2000) (plurality opinion) (applying, *inter alia, United States v. O'Brien*, 391 U.S. 367 (1968) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

The Tenth Circuit's decision in this case, *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2002),

provides substantial guidance as to the applicability of these factors t Ordinance 2001-04.

As to the first factor, the Tenth Circuit held that "[t]here is no doubt that the Ordinance is within the lawful powers of South Salt Lake City. *See City of Erie*, 529 U.S. at 296 (the city's 'efforts to protect public health and safety are clearly within the city's police powers')." 348 F.3d at 1197.

The second factor is the most disputed between Plaintiffs and the City. The Tenth Circuit observed that courts have an obligation to exercise independent judgment in First Amendment cases, but on the other hand . . . [the] City Council is in a better position than the Judiciary to gather and evaluate data on local problems. "(*Heideman*, at 1199) (*citing City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440) (2002) (plurality opinion).) Notably, the Tenth Circuit concluded that the then-existing evidentiary record failed to cast doubt on the City's empirical judgments. (*Heideman*, at 1200.)

The court of appeals found that as to the third factor, "the [Supreme] Court has consistently held that the control of negative secondary effects, such as those invoked by South Salt Lake City, is unrelated to the suppression of free expression." *Heideman*, 348 F.3d at 1200.

As to the fourth factor, the Tenth Circuit held that, even if the dancers were expressing a protected communication, pasties and G-strings have a "*de minimis*" effect on a dancers' ability to communicate, whatever the message. *Id.* (*citing City of Erie*, 529 U.S. at 301) ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government

interests, and the restriction leaves ample capacity to convey the dancer's erotic message.").

ANALYSIS

The City, in enacting an ordinance, may rely upon any evidence "reasonably believed to be relevant," including secondary effects. *City of Erie*, 529 U.S. at 283; *Alameda*, 535 U.S. at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring); *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 51-52 (1986). This includes evidence from a wide range of sources, including previous judicial opinions that recognize the harm targeted or the solution employed to address secondary effects. *City of Erie*, 529 U.S. at 297 (plurality opinion) (Justice O'Connor concluded that a city's reliance on the evidentiary foundation in the Court's previous decisions met the *Renton* test, *before* reaching the city's own findings).

The secondary effects involved can include a diverse set of "public health and safety problems," *id.* at 300, such as unsanitary conditions, lewd conduct, prostitution, sexually transmitted disease, crime, etc. *Heideman*, 348 F.3d at 1186. "[C]ities are entitled to rely, in part, on 'appeal to common sense,'" when reaching a legislative judgment. *Id.* at 1199 (quoting *Alameda*, 535 U.S. at 439 (plurality opinion)).

Furthermore, the City's legislative secondary effects evidence need not be local. See *Renton*, 475 U.S. at 52-53 (holding that cities may rely on secondary effects reports generated by other cities, that is to say the experience of others). Such need not be a "study" or "scientific" in the classic sense of the words. *City of Erie*, 529 U.S. at 300 (plurality opinion) (rejecting empirical evidence requirement

for nudity ban and specifically rejecting. the invocation of academic studies to challenge local government decision-making); *Alameda*, 535 U.S. at 438-39 (O'Connor, J.) (rejecting an "empirical data" requirement). *See also World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004) ("All five Justices in the *Alameda Books* plurality affirmed *Renton*'s core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses"); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 679 (W.D. Ky. 2002) ("The Supreme Court has made absolutely clear that a city, in devising regulations to limit or prevent secondary effects of adult entertainment, may rely upon studies from other cities, or even upon the evidentiary foundation established in other judicial opinions. . . . ").

The substantial deference given to the City's legislative record recognizes "the judiciary's limited role in reviewing content-neutral limitations on speech." *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F. 3d 683, 689 (10th Cir. 1998); *Heideman*, 348 F.3d at 1199 (emphasizing deference to city council's role). Courts are "not to reweigh the evidence *de novo*. . . ." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994).

The Court concludes that the City's legislative record meets the "reasonably believed to be relevant" standard. *City of Erie*, 529 U.S. at 283. The record reflects that the City's staff compiled cases, police reports, testimony from former sex industry workers, and secondary effects reports that document the problems of unsanitary conditions, public health risks, prostitution, crime, and urban blight associated with sexually oriented businesses in general

and public nude conduct in those businesses in particular. (*See* Ordinance Preamble, attached to Exhibit B to Rynearson Affidavit, filed April 30, 2004 (dkt. no. 122) as tab 1, at 2-4.)

Plaintiffs' theory of the case appears to be that the Court should re-weigh the legislative evidence *de novo* and assess the wisdom of the City's legislative judgment. However, Plaintiffs' theory does not resonate with the clear legal standard and case law that bind this Court. Specifically, where the City's nudity restriction "regulates conduct, not First Amendment expression, the City "should have sufficient leeway to justify such a law based on secondary effects." *City of Erie*, 529 U.S. at 298. Here, the City has justified its regulation of conduct with clear reliance on relevant Supreme Court cases, its own legislative findings, and documented secondary effects evidence.

Based on the foregoing,

IT IS ORDERED that the City of South Salt Lake's motion for summary judgment is GRANTED.

Let judgment be entered accordingly.

DATED this 24th day of August, 2004.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States Senior
District Judge

348 F.3d 1182

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FLONA M. HEIDEMAN; MARIEA M. BERRYMAN; CRYSTAL DIERINGER; HEATHER R. LILJENQUIST; JENNIFER GOFF; AMBER BLANKE; STACY LAMB; BOBBIE GLEASON; AMY WOODS; JANEEN BICKERSTAFF, Plaintiffs-Appellants, v. SOUTH SALT LAKE CITY, A Utah Municipal Corporation, Defendant-Appellee.	No. 02-4030

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. NO. 2:01-CV-918-J)

(Filed Nov. 4, 2003)

W. Andrew McCullough, McCullough & Associates, LLC, Midvale, Utah, for Plaintiffs-Appellants.

Scott D. Berghthold, Law Office of Scott D. Berghthold, P.L.L.C., Scottsdale, Arizona (and David M. Carlson and

Janice Frost, South Salt Lake, Utah, with him on the briefs), for Defendant-Appellee.

Before **LUCERO**, **HARTZ** and **McCONNELL**, Circuit Judges.

McCONNELL, Circuit Judge.

South Salt Lake City is a municipality of some 9,800 people, located immediately south of Utah's capital. The City's main artery, State Street or U.S. Highway 89, was the primary north-south highway in the area prior to construction of Interstate-15. State Street is the locus of a virtually uninterrupted string of gas stations, retail outlets, fast food restaurants, pawn shops, used car dealerships, old-fashioned drive-up motels, and the like; much of the City is occupied by light industry and the remaining area by modest single-family residences and apartments. The City's Chamber of Commerce touts the municipality as "Utah's Center of Industry."[1] Almost hidden among the warehouses and workshops of light industrial South Salt Lake City are – or were – three establishments featuring nude dancing.

The City Council recently enacted an ordinance prohibiting nudity within sexually oriented businesses. South Salt Lake City, Utah, Ordinance No. 2001-04 (the

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[1] South Salt Lake Chamber of Commerce, *at* http://www.southsaltlakechamber.com.

"Ordinance") (effective May 7, 2001) (codified as South Salt Lake City, Utah, Code, ch. 5.56 (the "Code")). Under the Ordinance, dancers at the establishments mentioned above may no longer drop the last stitch. *Id.* § 5.56.3100. The Plaintiffs-Appellants in this case, female dancers who object to the requirement of wearing "G-strings" and "pasties" during their performances, brought suit to enjoin the enforcement of the Ordinance, and filed a motion for a preliminary injunction in district court.

The district court denied their request for a preliminary injunction, commenting:

> The specific proposition stated by Plaintiffs, that nude dancing is a protected form of expression not subject to any limitation, has not been passed upon by the 10th Circuit Court of Appeals. It is this Court's opinion that if and when they consider this proposition, the modest limitations imposed by the ordinance will not be considered a burden on expression of erotic dancing in a sexually oriented business.

Order Upon Pls.' Mot. for Prelim. Inj. and Def.'s Mot. to Dismiss ("Order"), at 2 (Jan. 29, 2002), App. at 191. In response to a question from Plaintiffs' counsel regarding what issues would be open in the litigation on the merits, the district court declined to provide guidance beyond what was said in the ruling on the preliminary injunction.

The district court's reluctance to elaborate the law applicable to nude dancing is understandable. Twice in the past fifteen years, the United States Supreme Court has considered the constitutionality of ordinances banning commercial nude dancing under the Free Speech Clause, and both times the Court produced fractured decisions with no majority opinion and no clear statement of controlling

doctrine. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). This is because, as discussed below, it is far from clear how prohibitions of nude dancing "fit" within the conceptual structure of First Amendment law.[2] Despite the theoretical uncertainties, however, the results themselves in these cases have been consistent: the practitioners of nude dancing have lost and the ordinances have been upheld.

In their briefs and arguments in this Court, the Plaintiffs devote much of their attention to issues beyond the propriety of the denial of a preliminary injunction. In particular, they argue that they are entitled to trial on certain of their claims, which the Defendants stoutly deny. The procedural posture of this case, however, is not a direct challenge to the Ordinance or even a motion for summary judgment. It is an appeal from the district court's denial of a preliminary injunction against enforcement of the Ordinance. Our appellate review is limited by this posture. *See, e.g., Hawkins v. City & County of Denver,* 170 F.3d 1281, 1292 (10th Cir. 1999) (emphasizing narrow scope of appellate review of denial of a motion for preliminary injunction); *Southwest Voter Reg. Educ. Project v. Shelley,* 344 F.3d 914, 917-18 (9th Cir. 2003) (en banc) (noting that appellate review of the denial of a preliminary injunction is "limited and deferential"). The proper means for testing whether a trial is required is for one or both parties to move for summary judgment or judgment on the pleadings. No such motion has been made. The issue before us is simply whether the district court abused its

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[2] The best account of the theoretical difficulties may be found in Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing,* 33 *Wm. & Mary L. Rev.* 611 (1992).

discretion in denying a motion for preliminary relief on this record. The answer to that question is no.

Background

Under South Salt Lake City's prior Sexually Oriented Business Ordinance, originally enacted in February, 1991, commercial nude dancing was permitted, subject to regulation and licensing. The three establishments at which Plaintiffs work, or wish to work, provided nude entertainment for more than ten years under this licensing scheme. Around 1999, the City Council became concerned about what are called "negative secondary effects" – such as crime, prostitution, and lowered property values – thought to be associated with sexually oriented businesses. For approximately a year, City officials gathered police reports and studies from around the country regarding the connection between sexually oriented commercial business and these secondary effects.

The Ordinance was amended on January 10, 1996, and, after the studies, again on May 2, 2001. As currently formulated, the Ordinance forbids employees of such businesses[3] to "[a]ppear in a state of nudity before a patron on the premises of a sexually oriented business." Code § 5.56.310, 310(G).[4] The Ordinance also forbids patrons of

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[3] The Code defines a "Sexually oriented business" as "an adult arcade, adult bookstore, adult motion picture theater, adult novelty store, adult theater, adult video store, adult cabaret, and adult motel[,]" each of which is defined in the Code's "Definitions" section. Code § 5.56.050.

[4] The Code defines "[n]udity or state of nudity" as "the showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a fully opaque covering, or the showing of the

(Continued on following page)

these establishments to "[a]ppear in a state of nudity before another person on the premises of a sexually oriented business." Code § 5.56.320, 320(C). The Ordinance continues to permit semi-nude commercial dancing; dancers may perform wearing "pasties" and "G-strings." Plaintiffs maintain that these new restrictions violate their freedom of expression under the First Amendment, as applied to state and local governments through the Fourteenth Amendment.

Plaintiffs originally filed this action in the Third Judicial District Court for Salt Lake County, Utah. It was removed to federal district court on May 7, 2001. In their Complaint, filed April 30, 2001, and by motion, Plaintiffs requested a temporary restraining order and preliminary injunction against the enforcement of the Ordinance. The City filed a motion to dismiss on the pleadings.

The City argued that the Ordinance is justified by the City's interest in curtailing what it found to be the negative secondary effects of establishments featuring totally nude dancing. The targeted secondary effects the City identified included: venereal disease, prostitution, general poor sanitation, criminality, and offenses against minors, among others. *See* Preamble to Ordinance; Ordinance, "Purpose and Findings," (1)-(25). The City based its findings and conclusions on a number of sources cited in the Ordinance, including findings incorporated in decisions of the Supreme Court and this Court, as well as

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female breast with less than a fully opaque covering of any part of the nipple." Code § 5.56.050.

numerous other studies and statistics from the City police department and other municipalities.[5]

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[5] The cases and studies on which the City relied include the following:

City of Erie v. Pap's A.M., 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, [Inc.]*, 427 U.S. 50 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. La Rue*, 409 U.S. 109 (1972); *O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998); *Dodger's Bar & Grill, Inc. v. Johnson County*, 98 F.3d 1262 (10th Cir. 1996); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Com'rs*, 32 F.3d 1436 (10th Cir. 1994); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 2000); *MS News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983); *Cortese v. Black*, 95-1429, 1996 U.S. App. LEXIS 15311 (10th Cir. June 25, 1996); *Salt Lake City v. Wood*, 1999 Utah App. 323, 991 P.2d 595 (Utah Ct. App. 1999); *Salt Lake City v. Roberts*, 7 P.3d 789 (Utah [Ct.] App. 2000); *United States v. Freedberg*, 724 F.Supp. 851 (D. Utah 1989); reports of the South Salt Lake Police Department; and documents concerning the secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Phoenix, Arizona – 1984; Minneapolis, Minnesota – 1980; Houston, Texas – 1997; Indianapolis, Indiana – 1984; Amarillo, Texas; Garden Grove, California – 1991; Los Angeles, California – 1977; Whittier, California – 1978; Austin, Texas – 1986; Seattle, Washington – 1989; Oklahoma City, Oklahoma – 1986; Cleveland, Ohio – ; and Dallas, Texas – 1997; St. Croix County, Wisconsin – 1993; Bellevue, Washington – 1998; Newport News, Virginia – 1996; New York Times Square study – 1994; Phoenix, Arizona – 1995-98; and also on findings from the paper entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence," by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota, and from "Sexually Oriented Businesses: An Insider's View," by David Sherman, presented to the Michigan House Committee on Ethics and Constitutional Law, Jan. 12, 2000; crime statistics of the City of South Salt Lake for the past seven

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The district court held a hearing on January 3, 2002, on the Plaintiffs' motion for preliminary injunctive relief and the City's motion to dismiss. The only evidence before the district court at the time of the hearing was the Ordinance itself, the preamble of which contained citations to the studies and reports on which the City relied, and affidavits and testimony of four of the Plaintiffs regarding their perceptions of future economic harm that they would suffer absent an injunction. Although the nude dancing establishments, represented by Plaintiffs' counsel, had presented certain contrary studies and evidence to the City Council during its deliberations, Plaintiffs did not submit this or any other evidence contrary to the City's findings to the district court for consideration on their motion for a preliminary injunction.

In denying both motions from the bench, the district court observed:

> I'll deny the motion for a preliminary injunction. . . .
>
> It would appear to me that the modest effort at limitations provided by the ordinance as enacted by South Salt Lake City requiring the use of G strings and pasties in no way in my opinion limits expression. It would appear to me that expression allowed is at the outer limits that counsel has referred to and that the modest requirements set forth in the ordinance as to

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years; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota).

Ordinance, sec. I(B) ("Findings").

> semi-nude vers[u]s nude is an appropriate exercise of municipal power.
>
> I think that the issue presented, I hate to say the naked proposition but the specific proposition asserted by counsel for plaintiffs does indeed present an interesting question. That specific proposition as far as I know has never been passed on by the Tenth Circuit but my opinion is that if and when they consider it that the modest limitations imposed by the ordinance will not be considered a burden on expression of erotic dancing in a sexually oriented business establishment.
>
> It would appear to me that the justification set forth in the ordinance as to the secondary questions are legitimate questions for a city to be concerned with and that the modest limitations imposed in no way deprive the artist, the performer, the dancer from expression which is violative of the First Amendment. . . .

Tr. of Hearing dated Jan. 3, 2002 ("Tr."), at 102-04, App. at 184-86.

After the hearing, the district court entered a short order memorializing its observations from the bench. Four of these observations are relevant to our review here:

> 4. The South Salt Lake City ordinance requiring the use of G strings and pasties in sexually oriented businesses does not limit expression.
>
> 5. The modest requirement of the ordinance permitting semi-nudity and prohibiting nudity in sexually oriented businesses is an appropriate exercise of municipal power.

6. The specific proposition stated by Plaintiffs, that nude dancing is a protected form of expression not subject to any limitation, has not been passed upon by the 10th Circuit Court of Appeals. It is this Court's opinion that if and when they consider this proposition, the modest limitations imposed by the ordinance will not be considered a burden on expression of erotic dancing in a sexually oriented business.

7. The secondary harmful effects of nudity in a sexually oriented business are concerns that a municipality may legitimately address.

Order at 2, App. at 191. After making these findings, the order memorialized the denial of the motion for preliminary injunction which the district court had made from the bench.

Analysis

I. Standards of Review

We review the district court's decision to deny a preliminary injunction for abuse of discretion. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir. 2001). In doing so, we examine the district court's factual findings for clear error and review its legal determinations de novo. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243 (10th Cir. 2001); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir. 1986). The abuse of discretion standard commands that

> we give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence. We will not challenge that evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record.

United States v. Robinson, 39 F.3d 1115, 1116 (10th Cir. 1994) (citation omitted).

It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is "clear and unequivocal." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001); *see also SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991).

> But while the standard to be applied by the district court in deciding whether a [party] is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance [or denial] of the injunction, in light of the applicable standard, constituted an abuse of discretion.

Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975).

We must be mindful, therefore, as the Supreme Court has cautioned, that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules. The Federal Rules of Evidence do not

apply to preliminary injunction hearings. *See, e.g., SEC v. Cherif,* 933 F.2d 403, 412 n.8 (7th Cir. 1991); *Asseo v. Pan Am. Grain Co.,* 805 F.2d 23, 25-26 (1st Cir. 1986); *United States v. O'Brien,* 836 F.Supp. 438, 441 (S.D. Ohio 1993). Thus, as a prudential matter, it bears remembering the obvious: that when a district court holds a hearing on a motion for preliminary injunction it is not conducting a trial on the merits.

II. Preliminary Injunction Factors

Before a preliminary injunction may be entered pursuant to Fed. R. Civ. P. 65, the moving party must establish that:

> (1) [the movant] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992); *Kikumura,* 242 F.3d at 955. It is the movant's burden to establish that each of these factors tips in his or her favor. *Id.* However, "[t]he Tenth Circuit has adopted the Second Circuit's liberal definition of the 'probability of success' requirement." *Otero Sav. & Loan Ass'n v. Federal Reserve Bank,* 665 F.2d 275, 278 (10th Cir. 1981). Accordingly, we have held that where the moving party has established that the three "harm" factors tip *decidedly* in its favor, the "probability of success requirement" is somewhat relaxed. *Prairie Band,* 253 F.3d at 1246; *Continental Oil Co. v. Frontier Ref. Co.,* 338 F.2d 780, 781-82 (10th Cir. 1964) (same); *see also, e.g., Boucher v. School*

Bd., 134 F.3d 821, 825 n.5 (7th Cir. 1998). In such cases, "[t]he movant need only show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.'" *Resolution Trust*, 972 F.2d at 1199 (citing *Tri-State*, 805 F.2d at 358); *Otero*, 665 F.2d at 278. However, the Second Circuit has held, and we agree, that "[w]here . . . a preliminary injunction 'seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the less rigorous fair-ground-for-litigation standard should not be applied." *Sweeney v. Bane*, 996 F.2d 1384, 1388 (2d Cir. 1993) (quoting *Plaza Health Labs. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)). With this in mind, we consider whether the district court abused its discretion in the present case.

III. Application of Preliminary Injunction Factors: The Equities

A. Irreparable Harm

To constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *accord Prairie Band*, 253 F.3d at 1250. Irreparable harm is not harm that is "merely serious or substantial." *Prairie Band*, 253 F.3d at 1250 (quoting *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976)). "[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (emphasis in original) (brackets, citations, and internal quotation marks omitted). It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary

damages. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2948.1, at 152-53 (2d ed.1995).

The Plaintiffs presented no evidence that enforcement of the Ordinance during the time it will take to litigate this case in district court will have an irreparable effect in the sense of making it difficult or impossible to resume their activities or restore the status quo ante in the event they prevail. *See, e.g., Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1250 (10th Cir. 2003) (irreparable harm found when there was danger of actual death of eagles and destruction of their breeding grounds if developer were allowed to proceed); *Ohio Oil Co. v. Conway,* 279 U.S. 813, 814 (1929) (irreparable harm found in payment of an allegedly unconstitutional tax when state law did not provide a remedy for its return should the statute ultimately be adjudged invalid). At oral argument, Plaintiffs' counsel asserted that at least one of the establishments had been forced out of business, but no such evidence was presented in district court. In the absence of evidence to the contrary, we assume that Plaintiffs will be able to resume their nude dancing in the event they prevail on the merits. The only question, then, is whether the requirement that they wear pasties and G-strings in the meantime is sufficient injury to warrant preliminary injunctive relief.

The Supreme Court has made clear that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality op.); *see also Utah Licensed Beverage,* 256 F.3d at 1076 (noting presumption when infringement of First Amendment rights is alleged); *Homans v. City of Albuquerque,* 264 F.3d 1240,

1243 & n.2 (10th Cir. 2001); *ACLU v. Johnson,* 194 F.3d 1149, 1163 (10th Cir. 1999); *Community Communications Co. v. City of Boulder,* 660 F.2d 1370, 1380 (10th Cir. 1981). It is necessary, however, to consider the specific character of the First Amendment claim. The Supreme Court has observed that the requirement that dancers wear G-strings and pasties "is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Pap's,* 529 U.S. at 301 (plurality op.); *id.* at 294 ("Any effect on the overall expression [on account of requiring dancers to wear pasties and G-strings] is *de minimis.*"). In reliance on *Pap's,* the district court found that the "modest limitations" of requiring G-strings and pasties, would "not be considered a burden on expression of erotic dancing." Tr. at 103, lns. 14-16, App. at 185. Thus, while the harm to the Plaintiffs may arguably be imminent and irreparable, it is not "great" or "substantial."

For First Amendment purposes, the important point is that the Plaintiffs are able to convey their chosen message – not that they are able to do so in a state of undress. Appearing nude is not a First Amendment interest in the abstract, but only insofar as nudity is a means by which some message is conveyed. *See Pap's,* 529 U.S. at 289 (plurality op.) ("Being 'in a state of nudity' is not an inherently expressive condition."). The Supreme Court has held – and it stands to reason – that there are "ample" alternative means by which the Plaintiffs' erotic message might be conveyed.

But to say that a harm is "minimal" is not to say it is nonexistent. In the realm of performance art – to which the activity here is at least a distant cousin – the manner of presentation is part of the artistic enterprise. To tell

Mahler he could not convey the message of thunder using the kettle drum might leave open ample alternative means for communicating the desired message, but no one would say that the restriction was of no artistic consequence. Because our precedents dictate that we treat alleged First Amendment harms gingerly, we find that this element tips slightly in favor of the Plaintiffs. *See, e.g., Kikumura,* 242 F.3d at 963; *Utah Licensed Beverage,* 256 F.3d at 1076.

B. Balance of Harms

To be entitled to a preliminary injunction, the movant has the burden of showing that "the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction." *Kikumura,* 242 F.3d at 955. The record is nearly devoid of any finding by the district court regarding the injury to the City of not enforcing the Ordinance during the pendency of the litigation. Presumably, however, the court's conclusion that the harmful secondary effects of nudity in a sexually oriented business are concerns that a municipality may legitimately address has application to the short run as well as the long. Assuming for sake of argument that the Ordinance serves legitimate purposes and ultimately will be sustained, the interests of the City would be injured by postponing the day of its enforcement. In the context of constitutional challenges to Acts of Congress, Chief Justice Rehnquist has stated: "The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors,* 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *Bowen v. Kendrick,* 483 U.S. 1304, 1304 (1987) (Rehnquist,

C.J., in chambers). Although the presumption of constitutionality accorded a municipal ordinance is less than that accorded an Act of Congress, especially in a case involving an explicitly enumerated constitutional right, the ability of a city to enact and enforce measures it deems to be in the public interest is still an equity to be considered in balancing hardships. *See Plaza Health Labs.,* 878 F.2d at 580-83.

As with Plaintiffs' claim of hardship, however, the City's interest is less than substantial. Much of the City's professed concern about negative secondary effects arises from sexually oriented businesses in general rather than commercial nude entertainment in particular. The City offers no specific evidence that the requirement of pasties and G-strings will produce a significant incremental improvement with respect to the negative secondary effects. Moreover, the City has tolerated nude dancing establishments for many years, and even after embarking on a different policy took over a year to put the restrictions into effect. This invites skepticism regarding the imperative for immediate implementation.

Thus, the balance of hardships in this case is fairly even: neither party has shown that it will suffer grievous harm if it loses on the preliminary injunction motion.

C. Public Interest

A movant also has the burden of demonstrating that the injunction, if issued, is not adverse to the public interest. *Kikumura,* 242 F.3d at 955. The Plaintiffs cite the public's interest in ensuring that freedom of expression is not unconstitutionally curtailed. They also argue that there is a historic value to the businesses where the Plaintiffs work, in which, they contend, the public also has

an interest. On the other hand, the democratically elected representatives to the City Council are in a better position than this Court to determine the public interest with respect to questions of social and economic policy. The courts' peculiar function is to say what the law is, not to second-guess democratic determinations of the public interest. In this case, where the Plaintiffs' claim of the public interest is largely a restatement of their own constitutional interest, and the City's claim of public interest is largely a restatement of its own interest in regulating the conduct in question, the "public interest" prong of the preliminary injunction inquiry is nothing more than a restatement of the "balance of hardships" prong. This factor, therefore, also favors neither party.

IV. Application of Preliminary Injunction Standards: Likelihood of Success on the Merits

The final question before the district court was whether Plaintiffs demonstrated that they were likely to meet their burden of showing that the City's ordinances are facially unconstitutional infringements on their First Amendment rights to expression.

A. Constitutional Standards: The Appropriate Level of Scrutiny

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. Since *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the Supreme Court has held that the liberty of expression which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.

The Supreme Court has held that nude dancing "falls only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality op.); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality op.) (nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"). The Court has been less clear about the reasons why this is the case. It has not treated nude dancing as among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," such as bribery, obscenity, and fighting words, which play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Rather, the Supreme Court's analysis of restrictions on nude dancing combines two lines of First Amendment doctrine that, while in principle distinct, have become effectively merged. The first line of doctrine rests on the distinction between "speech" and "conduct." While the

Court has recognized that conduct is often expressive in character – burning a flag or sitting in at a segregated lunch counter are well-known examples of expressive conduct – the state has broad latitude to regulate expressive conduct if its interest in doing so is "unrelated to the suppression of free expression," if the regulation furthers "an important or substantial government interest," and if the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377 (1968). This line of cases applies here because, as the Court has explained, "[b]eing 'in a state of nudity' is not an inherently expressive condition," yet nude dancing is expressive conduct. *Pap's,* 529 U.S. at 289. The Court has held that a general prohibition on nudity is "unrelated to the suppression of free expression" because such a law prohibits a class of conduct, the act of appearing nude in public, without reference to any element of expression. *Barnes,* 501 U.S. at 566, 570-71.

The second line of doctrine rests on the distinction between the prohibition of certain messages based on their content and the enforcement of reasonable time, place, or manner restrictions – such as requiring that street demonstrations occur at times other than rush hour, that billboards be located away from scenic highways, or that sound trucks not exceed a certain decibel level. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981); *Kovacs v. Cooper,* 336 U.S. 77 (1949). Such regulations warrant relatively relaxed, or "intermediate," scrutiny not only if they are "content neutral" in the classic sense, but also if the government's regulatory purpose is not based on the communicative impact of the speech. *See*

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 445-470 (2002) (Kennedy, J., concurring).

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court noted that a zoning ordinance which attempted to locate theaters featuring "adult" films was "content based" to the extent that it identified the regulated activity by the content of the films shown. *Id.* at 47. Focusing on the purpose of the regulation, however, the Court determined that it merely aimed to impose time, place, or manner restrictions on account of the theaters' "secondary effects," meaning effects other than communicative impact on the audience. *Id.* "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." *Id.* at 48 (internal quotation marks and brackets omitted). The Court thus carved out a category of speech regulations that are "content-neutral" not because they apply to conduct on a generally applicable basis without regard to expressive content, but because the *regulatory purpose* is unrelated to that content. In *Ward v. Rock Against Racism*, the Court stated that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 491 U.S. 781, 791 (1989). This Court has held that restrictions based on the negative secondary effects of sexually oriented businesses are "content-neutral" in this sense. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 686 (10th Cir. 1998).

The principal conceptual distinction between the two lines of doctrine is that the former – the "*O'Brien* test" –

applies to generally applicable regulations of both non-expressive and expressive conduct, not targeting or singling out expressive conduct, while time, place, or manner regulations can be directed specifically at expression (such as billboards or street demonstrations), so long as the governmental purpose is unrelated to disagreement with the message and there are adequate alternative channels of communication.

In *Pap's,* a majority of the Court held that general prohibitions on public nudity, including commercial nude dancing, are subject to scrutiny "under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." 529 U.S. at 289 (plurality op. per O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.); *id.* at 310 (Souter, J., concurring). The Court also, however, relied heavily on the *Renton* line of cases. *Id.* at 295-96 (plurality op.); *id.* at 312-13 (Souter, J., concurring). The resulting doctrine thus seems to be a combination of the two lines of cases.

This case does not involve a general prohibition on public nudity, like that in *Barnes* and *Pap's.* Rather, it is a more narrowly tailored ban on nudity of either employees or patrons within sexually oriented businesses. Accordingly, it might be argued that the case is most accurately analyzed as a "manner" regulation. This would seem to have been the Court's point in *Pap's* when it noted: "The public nudity ban certainly has the effect of limiting one means of expressing the erotic message being disseminated at Kandyland. But simply to define what is being banned as the 'message' is to assume the conclusion." 529 U.S. at 292-93. *See also Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1308 (11th Cir. 2003) (applying *Pap's* and treating the G-string and pasties requirement

as a "manner" restriction). Nudity, after all, is not a message in itself, but is a mode of conveying any number of different messages. It can be humorous (as when "Hot-lips" Houlihan is exposed in the movie *M*A*S*H*); it can be dehumanizing (as in the registration scene in *Schindler's List*); it can be an act of self-affirmation (as in *The Full Monty*); it can symbolize unrighteousness (as in the Book of *Hosea*); it can symbolize innocence (as in Botticelli's *Birth of Venus*), or the loss of innocence (as in the movie *The Last Picture Show*); it can convey cruelty or disgust or freedom or – as Plaintiffs claim as their message – eroticism.[6] Often nudity is not communicative at all. By banning nudity in sexually oriented businesses, South Salt Lake City has not precluded the expression of any particular set of ideas, but has prohibited one particular

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[6] We are not troubled by the fact that this reasoning runs counter to Marshall McLuhan's iconic dictum that "the medium is the message." Marshall McLuhan, *Understanding the Media: The Extensions of Man* 23-35 (1964). Whatever might have been its merits in its own pop cultural context, McLuhan's dictum is incompatible with the basic thrust of modern First Amendment law, in which distinctions based on content ("the message") are subject to a different mode of analysis than distinctions based on time, place, or manner ("the medium"). *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 *U. Chi. L. Rev.* 46 (1987); *Content Regulation and the First Amendment*, 25 *Wm. & Mary L. Rev.* 189 (1983). That would be nonsensical if the medium really were the message. Other scholars have long maintained that media, or modes of expression, do not inherently convey a particular meaning, but generate meaning through the way they are used in particular settings. *See, e.g.*, John Dewey, *Art as Experience* 60- 64 (Perigree, 1980) (1934); Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* 317-18 (1980); Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 119 (1983) ("It is, after all, not just statues (or poems or paintings) that we have to do with but the factors that cause these things to seem important – that is, affected with import – to those who make or possess them, and these are as various as life itself.").

manner of conveying those ideas, which the City Council is convinced has negative secondary effects.

In one important sense, the South Salt Lake Ordinance is less constitutionally problematic than the general public nudity bans upheld in *Barnes* and *Pap's:* it is more narrowly tailored. In *Barnes* and *Pap's,* there was dispute regarding the applicability of the prohibitions to legitimate theater or dance involving nudity, such as the plays *Equus* or *Hair* or the ballet *Salome.* The broad sweep of the public nudity prohibition seemed to present a dilemma: either the prohibition would apply to such performances and thus appear overbroad, or it would not apply and thus appear to be administered in a content-discriminatory manner. By limiting its nudity ban to sexually oriented businesses – a classification that itself is "content-neutral" within the meaning of this Court's cases, *see Z.J. Gifts,* 136 F.3d at 686-87 – the City here has avoided both horns of the dilemma.

We turn now to Plaintiffs' arguments that the district court abused its discretion in finding that they had not demonstrated a likelihood of success on the merits.

B. Plaintiffs' Arguments for Heightened Scrutiny

Plaintiffs argue against application of the relatively relaxed standard of review employed in *Barnes* and *Pap's.* They point out that *Barnes* and *Pap's* involved general prohibitions on public nudity, while the South Salt Lake Ordinance bans nudity only within sexually oriented businesses. Accordingly, they argue that the South Salt Lake Ordinance is subject to strict scrutiny as a "content-based" restriction on speech. Their argument finds some support in two district court decisions, *Nakatomi Investments, Inc. v.*

City of Schenectady, 949 F.Supp. 988, 998-99 (N.D.N.Y. 1997), and *Books, Inc. v. Pottawattamie County,* 978 F.Supp. 1247, 1257 (S.D. Iowa 1997). But the argument – or at least the ultimate conclusion – has also been rejected by the only two courts of appeals to consider it. *Schultz v. City of Cumberland,* 228 F.3d 831, 846-47 (7th Cir. 2000); *Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1306-10 (11th Cir. 2003).

We reject Plaintiffs' argument for two independent reasons. First, the narrower scope of the South Salt Lake Ordinance, as compared with the general public nudity prohibitions of *Barnes* and *Pap's,* does not necessarily make the Ordinance "content-based." The prohibition is still on a form of conduct, and unless the category of businesses to which it applies is defined by their expressive content, the Ordinance remains "unrelated to the suppression of free expression." *O'Brien,* 391 U.S. at 377. Plaintiffs inform us that "[t]he ordinance at issue here applies only to adult businesses featuring nude dancing as expressive conduct," Appellants' Br. at 16, but they point to nothing in the Ordinance that supports that interpretation. On its face, the Ordinance applies to all "sexually oriented businesses," which include establishments such as "adult motels" and "adult novelty stores," which are not engaged in expressive activity. Although the "sexually oriented business" category certainly encompasses some expressive activities – adult cabarets and theaters, for example – this does not mean that the Ordinance targets them. The nudity ban applies across the board to all sexually oriented businesses, expressive and non-expressive alike. It is typical of conduct restrictions evaluated under *O'Brien* to include some expressive, as well as some non-expressive, activities within their reach.

Where, as here, expressive activities are not singled out for special regulation, *O'Brien* applies. *See Alameda Books,* 535 U.S. at 447 (Kennedy, J., concurring) (justifying application of lesser scrutiny to an ordinance that "is not limited to expressive activities [but] extends, for example, to massage parlors"); *Z.J. Gifts,* 136 F.3d at 686-87 (holding that an ordinance restricting sexually oriented business is content-neutral within the meaning of *Renton*).

Second, even if the South Salt Lake Ordinance must be distinguished from that in *Barnes* and *Pap's,* and cannot be justified as a generally applicable regulation of conduct, it still is subject to no more than intermediate scrutiny under the *Renton* line of cases, because the governmental purpose is based on the secondary effects of nudity in sexually oriented businesses rather than on disagreements with the content of the message. *Schultz,* 228 F.3d at 845-46. To be sure, as Plaintiffs point out, the ordinance upheld in *Renton* was a restriction on the locations within the city in which the sexually oriented businesses could locate, rather than, as here, a restriction on the manner in which they are permitted to operate. But we think Plaintiffs are wrong to characterize this as a "total ban" on the speech. Plaintiffs are not prohibited from communicating their supposedly erotic message through dance; they are merely prohibited from doing so in a state of total nudity. *See Fly Fish,* 337 F.3d at 1307-08.

In *Pap's,* the plurality explicitly rejected the dissent's characterization of a nudity prohibition as a "complete ban on expression." 529 U.S. at 292 (plurality op.). The plurality explained: "The public nudity ban certainly has the effect of limiting one particular means of expressing the kind of erotic message being disseminated. . . . But simply to define what is being banned as the 'message' is to

assume the conclusion." *Id.* at 292-93. Indeed, the plurality found that "[a]ny effect on the overall expression is *de minimis*." *Id.* at 294. Thus, far from being a "complete ban," the plurality found that the prohibition on nudity had a "*de minimis*" effect on the performers' ability to convey their desired message. *Id.; see also Schultz,* 228 F.3d at 847 (concluding that a requirement that dancers in sexually oriented businesses wear pasties and G-strings does not violate the First Amendment).

The fallacy in Plaintiffs' argument is to assume that the "adequate alternative avenues of expression" required under the *Renton* line of cases refers exclusively to location. Time, place, or manner regulations all are partial limitations, but each is partial in a different way. "Place" limitations require alternative locations; "time" limitations require alternative times; and "manner" limitations require alternative ways in which a message may be communicated. A ban on nudity within sexually oriented businesses is a "manner" regulation, *Fly Fish,* 337 F.3d at 1308-09, and Plaintiffs have provided no reason to believe that there do not exist other ways to get their message across. *See Pap's,* 529 U.S. at 301 ("the requirement that dancers wear pasties and G-strings . . . leaves ample capacity to convey the dancer's erotic message."); *Schultz,* 228 F.3d at 847 (same). While "there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here." *Pap's,* 529 U.S. at 293; *Fly Fish,* 337 F.3d at 1308.

C. Plaintiffs' Argument Regarding Evidence of Secondary Effects and the Record Before the District Court

Plaintiffs complain vigorously regarding the supposed inadequacy of the factual record in this case to support the City's claim that the Ordinance is justified by the need to control the negative secondary effects of commercial nude dancing. Indeed, they assert that "[t]here is no evidence that such effects have occurred, or are in imminent danger of occurring, in South Salt Lake. Plaintiffs believe that all evidence is to the contrary." Appellants' Br. at 24. However, as counsel conceded at oral argument before this Court, at the hearing in the district court on their motion for preliminary injunctive relief, the Plaintiffs did not present any evidence in support of their position. In their briefs in this Court, Plaintiffs refer to various studies that they submitted to the City Council, but did not trouble to present to the district court, and to other evidence that they submitted in unrelated litigation in state court, but likewise did not see fit to introduce below. *See* Appellants' Br. at 24-26. Under these circumstances, it is obvious that the district court did not abuse its discretion in denying their motion. Plaintiffs simply had not met their burden of showing that their right to relief was "clear and unequivocal." *Kikumura,* 242 F.3d at 955.

We turn, nevertheless, to the four elements of intermediate scrutiny, as set forth in *O'Brien,*[7] to determine

[7] The elements of intermediate scrutiny for time, place, or manner regulations are only slightly different. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Clark,* 468 U.S. at 293.

whether the district court abused its discretion in concluding, on this one-sided record, that Plaintiffs did not have a substantial likelihood of success on the merits. Under intermediate scrutiny, a restriction on speech must: (1) be within the constitutional power of government to adopt; (2) further an important or substantial governmental interest; which (3) is unrelated to the suppression of expression; and (4) be no greater restriction on First Amendment freedom than is essential to furtherance of the government's purpose. *O'Brien,* 391 U.S. at 377; *Pap's,* 529 U.S. at 296, 301.

There is no doubt that the Ordinance is within the lawful powers of South Salt Lake City. *See Pap's,* 529 U.S. at 296 (the city's "efforts to protect public health and safety are clearly within the city's police powers").

The second factor is probably the most important and contested. To survive intermediate scrutiny, the government must be able to demonstrate that the challenged speech restriction serves a "substantial governmental interest." *O'Brien,* 391 U.S. at 377. The burden of proof is on the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994).[8] On the other hand, the Court has repeatedly

[8] It is not obvious that intermediate scrutiny cases from other contexts are necessarily applicable to nude dancing or other sexually oriented speech, in light of the Court's position that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Barnes,* 501 U.S. at 584 (Souter, J., concurring) (quoting *Young,* 427 U.S. at 70). Nonetheless, the Court's recent decisions in the context of sexually explicit speech confirm that the government bears the burden of

(Continued on following page)

emphasized that "municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books,* 535 U.S. at 439, *quoting Renton,* 475 U.S. at 52, *quoting Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71 (1976) (plurality op.) (internal quotation marks omitted). The standards for the quantity and nature of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing in particular, are continuing to evolve.

In *Renton,* a six-Justice majority of the Supreme Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." 475 U.S. at 51-52. Accordingly, it is common in these cases for cities to cite and rely on seemingly pre-packaged studies, as well as the findings of courts in other cases. Here, South Salt Lake invoked a typical set of such studies and findings in support of its Ordinance.

In *Barnes,* the three-Justice plurality (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy) sustained a prohibition on public nudity, as applied to nude dancing, on the basis of the "substantial government interest in protecting order and morality," without the

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providing evidence of secondary effects, where it relies on those secondary effects as the justification for restricting speech. *See Alameda Books,* 535 U.S. at 437 (plurality op.).

need for any empirical evidence regarding secondary effects. *Barnes,* 501 U.S. at 569 (plurality op.). Justice Scalia concurred on the ground that a general public nudity prohibition "is not subject to First Amendment scrutiny at all." *Id.* at 572 (Scalia, J., concurring). The decisive fifth vote was cast by Justice Souter, whose opinion is controlling under the rule of *Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)). Justice Souter concluded, contrary to the plurality, that the city was required to show secondary effects of the sort canvassed in *Renton,* and not merely an interest in order and morality. *Barnes,* 501 U.S. at 583-86 (Souter, J., concurring). But he maintained that it was not necessary for cities to "litigate this issue repeatedly in every case," and thus that previous court findings in *Renton* and other cases provided sufficient evidentiary support. *Id.* at 584.

In *Pap's,* a four-Justice plurality (Justice O'Connor, joined by the Chief Justice, Justice Kennedy, and Justice Breyer) voted to uphold a general public nudity ban almost identical to that upheld in *Barnes,* but did so on the basis of secondary effects. The Court emphasized that the city did not have to produce new studies and was permitted to rely on the evidentiary foundation in earlier cases. *Pap's,* 529 U.S. at 296-97. The Court also treated the judgments of city council members regarding the need for the ordinance as evidence. "The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took

place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects." *Id.* at 297-98. Indeed, the Court observed that "*O'Brien,* of course, required no evidentiary showing at all that the threatened harm was real." *Id.* at 299; *see also id.* at 298 ("On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized. . . ."). The plurality also noted that the plaintiffs had "ample opportunity to contest the council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court," but had failed to do so. *Id.* at 298. "In the absence of any reason to doubt it," the plurality stated, "the city's expert judgment should be credited." *Id.*

Two Justices concurred on the ground that a regulation of conduct is unconstitutional only where the "government prohibits conduct precisely because of its communicative attributes," making it unnecessary to inquire into the empirical basis for the secondary effects justification (about which these Justices were skeptical). *Id.* at 310 (Scalia, J., joined by Thomas, J., concurring). Accordingly, under the rule of *Marks,* the plurality opinion constitutes the holding of the Court. This suggests that the City's initial burden to present empirical support for its conclusions is minimal, but that plaintiffs must have an opportunity to present their own evidence, to which the city is then entitled to respond.

In *Alameda Books,* the Court granted certiorari to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton.*" 535 U.S. at 433. Again, however, the Court failed to produce a majority opinion. The four-Justice plurality

(Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Thomas) reaffirmed the basic approach taken in *Renton* and *Barnes*. The Court explained that "the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects," but it did not require the city to "bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own." *Id.* at 437. The plurality distinguished between two parts of the *Renton* intermediate scrutiny framework: whether an ordinance is content-neutral and whether it serves a substantial governmental interest while leaving open alternative avenues of communication. Only with regard to the latter would the courts "examine evidence concerning regulated speech and secondary effects." *Id.* at 440-41.

Even as to that connection, the plurality reiterated that the Court had "refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id.* at 438. It stated that cities are entitled to rely, in part, on "appeal to common sense," rather than "empirical data," at least where there is no "actual and convincing evidence from plaintiffs to the contrary." *Id.* at 439. In so holding, the *Alameda* plurality provided the following observation regarding the deference properly accorded to legislative findings under the second prong of the *O'Brien* test:

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by

> demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (citing *Pap's*, 529 U.S. at 298). The plurality described its "deference to the evidence presented by the city" as "the product of a careful balance between competing interests." *Alameda*, 535 U.S. at 440. On the one hand, courts have an obligation to exercise independent judgment in First Amendment cases, but on the other hand the plurality acknowledged "that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems." *Id.*

Justice Kennedy concurred separately. However, he did not criticize the plurality's approach to the evidence necessary to support a secondary effects justification. If anything, Justice Kennedy's comments on that issue appear somewhat more deferential to the cities: "As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.* at 451 (Kennedy, J., concurring). "The Los Angeles City Council knows the streets of Los Angeles better than we do. . . . It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.* at 452.

Applying these precedents, we cannot say that the district court abused its discretion in concluding that the

Plaintiffs failed to show a likelihood of success on the merits. The evidentiary record compiled by South Salt Lake City is similar to the record on which the Court affirmed the ordinance in *Pap's.* Presumably, the City Council of South Salt Lake is entitled to as great a degree of deference as that of any other. The Plaintiffs failed to submit any evidence in district court that might call the City's empirical judgments into question. Without "actual and convincing evidence from plaintiffs to the contrary," *Alameda Books,* 535 U.S. at 439 (plurality op.), there was no reason for the district court to inquire any further.

The third *O'Brien* factor, that the government interest is unrelated to the suppression of free expression, follows from the second. As explained above, from *Renton* onward, the Court has consistently held that the control of negative secondary effects, such as those invoked by South Salt Lake City, is unrelated to the suppression of free expression.

Finally, the district court did not abuse its discretion in concluding that the Ordinance satisfies the fourth and final *O'Brien* factor – that the restriction is no greater than is essential to the furtherance of the government interest – for the same reason that factor was satisfied in *Pap's:* the requirement that dancers wear "G-strings" and "pasties" has a "*de minimis*" effect on their ability to communicate their message. *Pap's,* 529 U.S. at 301 ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message."). Plaintiffs evidently disagree with that conclusion, but offer no basis for distinguishing the Supreme Court's conclusion.

In summary, as the case is now postured, the Plaintiffs put on no evidence before the district court to establish a likelihood that *O'Brien* factors two, three and four favored their case on the merits. Because they failed to put on such evidence, the Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

Conclusion

For the foregoing reason, the decision of the district court denying the Plaintiffs' motion for preliminary injunction is AFFIRMED. However, because the record before us is very limited, we note specifically that we express no opinion on the ultimate merits of this case. Plaintiffs' motion to supplement the record with materials not before the district court is DENIED.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

FLONA M. HEIDEMAN; MARIEA M. BERRYMAN; JANUARY L. WEBB; CRYSTAL DIERINGER; HEATHER R. LILJENQUIST; JENNIFER GOFF, Plaintiffs, vs. CITY OF SOUTH SALT LAKE, a Utah municipal corporation, Defendant.	Case No. 2:01-CV-918J ORDER UPON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION and DEFENDANT'S MOTION TO DISMISS (Filed Jan. 29, 2002)

On January 3, 2002, a hearing was held upon Plaintiffs' Motion for Preliminary Injunction and Defendant's Motion to Dismiss. Plaintiffs appeared together with their attorney Andrew W. McCullough, of Orem, Utah. Defendant appeared through its attorneys Paul H. Proctor, H. Craig Hall, of South Salt Lake City, Utah, and Glenn C. Hanni of Strong & Hanni, of Salt Lake City, Utah.

The motions were argued and in addition, Plaintiffs were granted the opportunity to call witnesses to testify pertaining to Plaintiffs' Motion for Preliminary Injunction.

Felina Johnson, Amy Woods, Heather R. Liljenquist and Amber Blanke, each testified.

Upon further argument, the Court made the following findings and conclusions:

1. Plaintiffs' complaint in this Court presents claims and causes of action grounded upon the Constitution and laws of the United States, a sovereign different from the state of Utah.

2. The claims and causes of action in the litigation pending in the Third Judicial District Court, Salt Lake County, Utah before Judge Dennis Frederick, are grounded upon the Constitution and laws of the state of Utah.

3. The plaintiffs before this Court are different than those plaintiffs in the litigation before Judge Frederick.

4. The South Salt Lake City ordinance requiring the use of G strings and pasties in sexually oriented businesses does not limit expression.

5. The modest requirement of the ordinance permitting semi-nudity and prohibiting nudity within sexually oriented businesses is an appropriate exercise of municipal power.

6. The specific proposition stated by Plaintiffs, that nude dancing is a protected form of expression not subject to any limitation, has not been passed upon by the 10th Circuit Court of Appeals. It is the Court's opinion that if an when they consider this proposition, the modest limitations imposed by the ordinance will not be considered a burden on

expression of erotic dancing in a sexually oriented business.

7. The secondary harmful effects of nudity in a sexually oriented business are concerns that a municipality may legitimately address.

8. Plaintiffs also make claims respecting the City ordinance regulating alcohol related clubs and non-alcohol related clubs; the need for clarification of such regulation, as acknowledged by South Salt Lake City; the executive action and legislative action taken by the City respecting the regulation and ordinance; and, the manner of the City's enforcement and application of these alcohol regulations.

9. These claims and causes of action, relating primarily to the process of and justification for the ordinance regulating alcohol related clubs and non-alcohol related clubs, remain for this Court to address.

Accordingly, IT IS ORDERED:

1. Plaintiffs' motion for preliminary injunction is denied.

2. Defendant's motion to dismiss is denied.

DATED this 29th day of ~~February~~ January, 2002.

UNITED STATES
DISTRICT COURT

/s/ Bruce S. Jenkins
Hon. Bruce S. Jenkins

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FLONA M. HEIDEMAN, MARIEA M. BERRYMAN; CRYSTAL DIERINGER; HEATHER R. LILJENQUIST; JENNIFER GOFF,

Plaintiffs-Appellants,

ASHLEIGH MANN; LEAH RAE MALCOLM; AMERICAN BUSH,

Plaintiffs-Intervenors-Appellants,

v.

SOUTH SALT LAKE CITY, a Utah Municipal Corporation.

No. 04-4199
(D.C. No. 2:01-CV-918-BSJ)

ORDER
Filed March 9, 2006

Before **MURPHY, O'BRIEN**, and **SEYMOUR**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ Jennifer Clark
Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

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FLONA M. HEIDEMAN, et al.	:	NOTICE OF APPEAL
Plaintiffs,	:	
vs.	:	Civil No. 2:01 CV-918J
SOUTH SALT LAKE CITY, a Utah Municipal Corporation,	:	
Defendant.	:	

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(Filed Feb. 13, 2002)

COME NOW the Plaintiffs in the above entitled action and, pursuant to 28 U.S.C. § 1292(a)(1), give notice that the appeal to the Tenth Circuit of Appeals is from the Order denying Plaintiffs' Motion for Preliminary Injunction herein, entered on January 29, 2002. The parties to this appeal are Plaintiffs and Appellants Flona M. Heideman, Mariea M. Berryman, Crystal Dieringer, Heather R. Liljenquist, Jennifer Goff, Amber Blanke, Stacy Lamb, Bobbie Gleason, Janeen Bickerstaff and Amy Woods; and

South Salt Lake city, a municipal corporation, as Defendant and Appellee.

DATED this 12th day of February, 2002.

MCCULLOUGH &
ASSOCIATES, L.L.C.

/s/ W. Andrew McCullough
W. Andrew McCullough
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of February, 2002, I did mail a true and correct copy of the foregoing Notice of Appeal, postage prepaid to Paul Proctor, attorney for Defendant, 220 East Morris Ave. #440, Salt Lake City, UT 84115; and Glenn Hanni, Esq., 9 Exchange Place #600, Salt Lake City, UT 84111.

/s/ Chelsea Travis